STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 22, 2006
v	No. 260627 Wayne Circuit Court
MICHAEL EDWARD MABINS, Defendant-Appellant.	LC No. 03-010444

Before: Kelly, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from his jury convictions of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 9 to 15 years for the assault conviction and 2 to 5 years for the felon-in-possession conviction, and a consecutive two-year term for the felony-firearm conviction. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first challenges the sufficiency of the evidence with respect to each conviction. In reviewing the sufficiency of the evidence in a criminal case, this Court must review the record de novo and, viewing both direct and circumstantial evidence in a light most favorable to the prosecution, determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). It is for the trier of fact to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). We must resolve all conflicts in the evidence in favor of the prosecution. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *Id*. The intent to kill may be proven by inference from any facts in evidence, including proof of the victim's injuries, and minimal circumstantial evidence is sufficient. *Id*.

The victim, DeShawn Jefferson, testified that he temporarily stopped his car because a man was standing in the road in front of him. Defendant then came out of or from behind a

house to the rear of Jefferson's car and opened fire, striking the vehicle several times and striking Jefferson in the shoulder. Defendant contends that this evidence was insufficient to prove that he harbored an intent to kill. We disagree. The intentional discharge of a firearm at someone within range, under circumstances that did not justify, excuse, or mitigate the crime, is sufficient to prove assault with intent to commit murder. *People v George Johnson*, 54 Mich App 303, 304; 220 NW2d 705 (1974).

Because Jefferson testified that defendant was armed with a gun at the time he committed the assault offense and the assault is not an excluded felony under the felony-firearm statute, the evidence was sufficient to sustain defendant's felony-firearm conviction. MCL 750.227b(1); *People v Avant*, 235 Mich App 499, 505-506; 597 NW2d 864 (1999).

The prosecutor's burden of proof for establishing a violation of MCL 750.224f(2) consists of only two elements: (1) that defendant possessed a weapon, (2) after being convicted of a specified felony. Where, as here, more than five years have passed since the defendant completed the sentence imposed for the specified felony and the charge is predicated on the fact that the defendant's possessory rights have not been restored, the prosecutor need not prove that the defendant's rights had not been restored unless the defendant first produces some evidence of restoration. *People v Perkins*, 473 Mich 626, 628-629; 703 NW2d 448 (2005). If the charge is predicated on conviction of a felony other than a specified felony, possession of the weapon constitutes a crime only if it occurs less than three years since the defendant completed his sentence. MCL 750.224f(1); CJI2d 11.38.

The prosecutor charged that defendant had been convicted of a prior specified felony, possession of less than 25 grams of a controlled substance, MCL 333.7403(2)(a)(v), and that defendant's rights to possess a firearm had not been restored. Before presenting evidence regarding this conviction, the prosecutor announced that the parties had agreed to stipulate, "defendant has been convicted of a prior felony." Defense counsel agreed, stating, "We'll stipulate to *that prior conviction* on the part of my client, your Honor." On the trial court's further inquiry, defense counsel also stipulated that defendant's right to carry a firearm had not been restored. In context, we find the parties' stipulation sufficient to establish that defendant had been convicted of a specified felony, MCL 750.224f(6)(ii), and that defendant's right to possess or use a firearm had not been restored, MCL 28.424. Defendant was prohibited from possessing or using a firearm regardless of when his prior specified felony conviction occurred. MCL 750.224f(2); *Perkins, supra* at 631-632. Because the prosecutor also presented sufficient evidence to permit a rational jury to find beyond a reasonable doubt that defendant possessed a firearm, the evidence was insufficient to sustain defendant's conviction for the charge of felon in possession of a firearm.

Defendant next contends that he was denied his due process rights by the loss or destruction of potentially exculpatory evidence. We disagree.

It is generally preferable that the police "keep all evidence until the criminal prosecution is concluded without concern for its value at trial." *People v Tate*, 134 Mich App 682, 692; 352 NW2d 297 (1984). However, the failure to preserve evidence that may have exonerated the defendant does not constitute a denial of due process unless the defendant shows that the police acted in bad faith, *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993), or intended to deprive the defendant of evidence, *People v Ricardo Johnson*, 197 Mich App 362, 365; 494

NW2d 873 (1992). "Defendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith." *Id.*

In this case, defendant admits that the unpreserved statement was only "potentially exculpatory" and has not shown that the police acted in bad faith when they failed to preserve the statement. Therefore, he has not met his burden of proving a right to relief. Further, the only alleged exculpatory information in the statement was that Jefferson identified someone other than defendant as his assailant and Jefferson was cross-examined on this alleged discrepancy. Accordingly, we conclude that defendant has failed to establish a due process violation.

Finally, defendant contends that he is entitled to a new trial due to the ineffective assistance of counsel. Because defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *People v Snider,* 239 Mich App 393, 423; 608 NW2d 502 (2000). "To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant." *Id*. at 423-424.

Defendant contends that trial counsel was ineffective because he failed to move for dismissal or request an adverse instruction based on the missing witness statement. As noted above, defendant failed to establish a denial of due process. "[T]rial counsel cannot be faulted for failing to raise an objection or motion that would have been futile." *People v Fike,* 228 Mich App 178, 182; 577 NW2d 903 (1998).

Where the prosecution acts in bad faith, an adverse inference instruction similar to that found in M Civ JI 6.01 is warranted. *People v Cress,* 250 Mich App 110, 157-158 n 27; 645 NW2d 669 (2002), rev'd on other grounds 468 Mich 678 (2003). Here, defendant has not met his burden of showing that prosecution acted in bad faith. *Ricardo Johnson, supra* at 365. Further, it is unlikely that counsel's failure to request the instruction affected the outcome of the trial because the inference is permissive, not mandatory, and thus the jury was not required to draw such an inference. *Brenner v Kolk,* 226 Mich App 149, 155-156; 573 NW2d 65 (1997).

Defendant further contends that counsel was ineffective for failing to move for a mistrial after Jefferson became evasive, belligerent, and argumentative during cross-examination.

"A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial." *People v Lugo,* 214 Mich App 699, 704; 542 NW2d 921 (1995). Absent evidence that the prosecutor conspired with or encouraged the witness to give the testimony at issue, an unresponsive or volunteered answer to a proper question is not a basis for a mistrial unless the alleged error is so egregious that its prejudicial effect can be cured in no other way. *People v Hackney,* 183 Mich App 516, 531; 455 NW2d 358 (1990); *People v Lumsden,* 168 Mich App 286, 299; 423 NW2d 645 (1988). Similarly, an unsolicited outburst of a witness is not grounds for a mistrial unless the comment is so egregious that the prejudicial effect cannot be cured. *People v Gonzales,* 193 Mich App 263, 266; 483 NW2d 458 (1992).

Defendant has not shown that the prosecutor knew that Jefferson planned to volunteer the information at issue or that he solicited the volunteered remarks offered by Jefferson. Further,

Jefferson's unresponsive answers did not include any information prejudicial to defendant. At most, he called his own credibility into question by being uncooperative. Indeed, defense counsel argued that Jefferson's testimony was "incredible" and could not be trusted or believed. Because Jefferson's testimony was not such as to deprive defendant of a fair and impartial trial, defense counsel was not ineffective for failing to request a mistrial.

We affirm.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Patrick M. Meter